Nos. 17-1717, 18-18

In The

Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF THE PETITIONERS

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Interest of Amicus

Amicus Wisconsin Institute for Law & Liberty[1] is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, it has advocated for religious liberty, and its founder, President, and General Counsel, Richard M. Esenberg, has written extensively on the subject of the Establishment Clause. *See, e.g.*, Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle that Lets Me in*, 18 WM. & MARY BILL RTS. J. 1 (2009); Richard M. Esenberg, *You Cannot Lose if You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1 (2006); Richard M. Esenberg, *Of Speeches and Sermons: Worship in Limited Purpose Public Forums*, 78 MISS. L.J. 453 (2006). Amicus asks this Court to reverse the Fourth Circuit's decision below.

Summary of Argument

In his Farewell Address of 1796, then-President George Washington wrote that "[o]f all the dispositions and habits which lead to political prosperity, religion and morality are indispensable

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[1] As required by Supreme Court Rule 37.6, Amicus states as follows: no counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the Amicus, its members, or its counsel, made such a monetary contribution. Pursuant to Supreme Court Rule 37.3(a), written consent of all parties to the filing of this brief has been provided.

supports. . . . The mere politician, equally with the pious man, ought to respect and to cherish them." George Washington, *Farewell Address* (1796). Just over two hundred years later, a federal appellate court has ordered the removal of a memorial to World War I veterans from public land – a memorial that had not faced legal challenge over its 90-year history – simply because the memorial is in the shape of a Latin cross. It seems we have come a long way from Washington's America.

Any explanation for this radical change should begin with a discussion of "[t]his Court's Establishment Clause jurisprudence," which, in the words of some of the Court's own members, "is in disarray." *Rowan Cty., N.C. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari). The Court's shifting and multifarious tests for determining the permissibility of government speech involving religious concepts or images have proven difficult to apply with certainty, leading too many courts to err on the side of suppression. But this case offers the Court at least two opportunities to right the ship.

First, the Court should reconsider application of the Establishment Clause to the states through incorporation. If the original intent of the Establishment Clause was to protect state establishments by forbidding establishment at the federal level, then it is unclear how that federalism provision – designed not to create individual rights but to safeguard state prerogatives – can transubstantiate to a restriction on the states. While this Court has so far declined to re-examine

incorporation of the Establishment Clause, its inability to articulate a consistent and readily understandable standard for what constitutes prohibited establishment suggests that the time has come.

Second, the Court should re-examine and clarify its treatment of government speech that is claimed to "advance" or endorse religion. The second is related to the first. For if the Establishment Clause protects an individual right against government action, then this right must be defined consistent with the interests that an individual right against establishments is designed to protect. This Court has made clear, moreover, that whatever this interest against establishment might be, it must be religiously neutral, *i.e.*, it can neither advance nor inhibit religion. It is not the imposition of a public secularity.

That interest might be served by a prohibition against traditional establishments or coercion, *e.g.*, legally-coerced participation in religious observances or support of religious institutions. It might even be served by the prohibition of government action that inserts the state into religious decision-making in some material way, such as a state-sponsored campaign to "promote" religions with particular tenets. And this Court has acted to protect citizens from this type of action by states and local units of government.

But can these interests be served by an attempt to protect citizens from *any* form of government endorsement or encouragement of

religion (or even particular religions) generally? That has been shown to be an unattainable ambition. This Court has also protected citizens from the government endorsement of religion whenever that endorsement might make a "reasonable observer" feel like a disfavored member of the political community. In so doing, this ideal of non-endorsement has, at times, been quite robust in seeking to protect non-adherents from the slightest exposure to speech that might be attributable to the government and might be interpreted as a government endorsement of religion.

But an Establishment Clause jurisprudence that seeks to protect citizens from the slightest religious insult or relatively innocuous forms of endorsement has not been applied in an even-handed way. The Court has not extended the same protection to religious adherents exposed to secular messages that convey disapproval of a religious point of view or remedied the sense of exclusion they feel when religion is excluded from contexts in which it logically "belongs." This imposes the same type of injury on religious adherents that endorsement of explicitly religious perspectives places on the irreligious or on religious minorities.

This Establishment Clause asymmetry subjects the same injury to different constitutional protections. It has resulted in a patchwork of results that has been impossible to reconcile, most famously reflected in the differing outcomes in *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005). It is simply not possible to protect the sensibilities of both the

religious and the irreligious in the way that cases such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the endorsement test first set forth in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), command. This case gives the Court a chance to set a more workable standard.

ARGUMENT

I. The Establishment Clause Cannot Be Incorporated into the Fourteenth Amendment Because It Does Not Protect an Individual Right

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. This Court has held that the due process clause of the Fourteenth Amendment applies many of the Bill of Rights' protections to the States, *see, e.g., Duncan v. Louisiana*, 391 U.S. 145, 148 (1968), and has employed differing tests to determine which of these protections are to be incorporated into the Fourteenth Amendment. Early cases asked whether a right reflects "immutable principles which inhere in the very idea of free government," *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), and whether a right is "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). More recently, the Court has emphasized "whether a particular Bill of Rights guarantee is

fundamental to our scheme of ordered liberty and system of justice." *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (citing *Duncan*, 391 U.S. at 149), and whether it is "deeply rooted in this Nation's history and tradition." *Id.* at 767. Whatever the precise formulation, incorporation requires the presence of an individual right.

Yet in its decision announcing incorporation of the Establishment Clause, this Court offered no explicit definition of that right; nor did it offer a fully-developed explanation of why incorporation is appropriate. In *Everson v. Board of Education of Ewing Township*, the Court, after noting that state establishments existed at the time of the founding and persisted for some time after, said only the following:

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action

> abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones*, 13 Wall. 679, 730 [(1871)]: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

330 U.S. 1, 14-15 (1947).

The text of the Establishment Clause – prohibiting Congress from making any law "respecting an establishment of religion" – is worded as a constraint on the federal government. This would not, in and of itself, preclude incorporation. The First Amendment's guarantee of the free exercise of religion and freedom of speech and the press are also worded as restraints upon Congress. U.S. CONST. amend. I. But unlike those protections, the restraint of the Establishment Clause is not directed at an abridgment of a personal freedom. In context, then, it is best read as a federalism provision, directed at prohibiting federal establishments in order to protect the prerogatives of the states in that area rather than some type of individual right to disestablishment.

A. At the founding, states had established religions

Prior to enactment of the federal Constitution, states generally took one of two positions with respect to establishment of religion. The "Virginia Understanding" sought to privatize religion and deny any state funding or support. More commonly, the "Massachusetts Way" used public funding and endorsement of religion "as a means to nurture and to encourage good citizenship." The Massachusetts Way prevailed in much of New England while the Virginia Understanding was adopted in New York and Rhode Island. Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585, 605, 611-12 (2006).

These approaches transcended adoption of the federal Constitution and Bill of Rights. During the Revolution, nine of the thirteen colonies had religious establishments, Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1706 (1992), with six of them surviving the Revolution, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring). After the U.S. Constitution went into force in 1789, only the New England states maintained legal and financial support for their churches. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436-37 (1990). Massachusetts was the last state to disestablish its church, in 1833. *Rethinking the*

Incorporation of the Establishment Clause, *supra*, at 1706.

B. The Establishment Clause does not protect an individual right

In light of this, Justice Thomas has concluded that "the Establishment Clause is best understood as a federalism provision – it protects state establishments from federal interference but does not protect any individual rights." *Newdow*, 542 U.S. at 50 (Thomas, J., concurring). According to Justice Thomas:

> The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." As a textual matter, this Clause probably prohibits Congress from establishing a national religion. Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause. Nothing in the text of the Clause suggests that it reaches any further. The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress

> from "abridging [particular] *freedom[s]*." This textual analysis is consistent with the prevailing view that the Constitution left religion to the States. History also supports this understanding: At the founding, at least six States had established religions.

Id. at 49-50 (Thomas, J., concurring) (citations omitted) (emphasis in *Newdow*); *see also Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 604-07 (2014) (Thomas, J., concurring) (concluding from the history of state establishments that no individual right is protected by the Establishment Clause).

The fact that structural limitations on the government promote individual liberty does not transform those limitations into individual rights. If the government cannot act in a certain area, then people will be "free" of whatever it is that government is forbidden to do. But we do not generally suppose that this logical connection between government restraint and individual freedom implies a positive individual right. We do not suppose, for example, that the prohibition on states coining money, U.S. CONST. art. I, § 10, creates an individual right to be free from state currency. We have not concluded that, because Congress can only do certain things, the states, post the Reconstruction Era Amendments, are now also prohibited from doing the same things (a necessary corollary of a conclusion that such prohibitions create individual rights).

It is no answer to say that the limitation of Congress to enumerated powers is part of our federal structure. So it is. But it begs the question to simply assume that the Establishment Clause is also not part of that federal structure:

> The best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Federal Government, to be free from coercive federal establishments. Incorporation of this individual right, the argument goes, makes sense. . . . But even assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. For the reasons discussed above, it is more likely that States and only States were the direct beneficiaries. Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect – *state* establishments of religion. Nevertheless, the potential right against federal establishments is the only candidate for incorporation. . . As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause

> protected – state practices that pertain to "an establishment of religion." At the very least, the burden of persuasion rests with anyone who claims that the term took on a different meaning upon incorporation.

Newdow, 542 U.S. at 50-51 (Thomas, J., concurring) (citations omitted) (emphasis in original).

C. Because the Establishment Clause does not protect an individual right, it cannot be incorporated

While one might hypothesize that the passage of the Fourteenth Amendment recalibrated the degree to which the federal government – including its courts – might interfere with state power and permitted application of a right to disestablishment that had been applied only to the national government, the ability to formulate a hypothetical does not prove its validity. Most scholars have concluded that the Establishment Clause was not intended – either at the time of its initial adoption or at passage of the Fourteenth Amendment – to create an individual right. Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998); Steven D. Smith, FOREORDAINED FAILURE (1995); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1135–42 (1988); Gerard V. Bradley, CHURCH-STATE RELATIONSHIPS IN AMERICA 9–10, 95–96 (1987); Daniel L. Dreisbach, REAL THREAT AND MERE SHADOW 89–96 (1987); Joseph M. Snee, *Religious*

Disestablishment and the Fourteenth Amendment, 1954 WASH U.L. Q. 371 (1954); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949). *But see* Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L. J. 669 (2013) (arguing that prohibition of establishment is intrinsically linked to the individual right to be free of establishment which became applicable to the states through passage of the Fourteenth Amendment).

Scholars concluding that the Establishment Clause ought not be incorporated note the absence of references to disestablishment in the debates surrounding the drafting and ratification of the Fourteenth Amendment. Brose, *supra*, at 17-29; Smith, *supra*, at 50-52. They typically point to the failure of the federal Blaine Amendment, a constitutional amendment proposed after ratification of the Fourteenth Amendment that would have applied the Free Exercise and Establishment Clause to the states. Corwin, *supra*, at 17; Conkle, *supra*, at 1139-40. While incorporation was not a recognized legal theory at the time, a widespread assumption that the Fourteenth Amendment did not protect against state establishments at least casts doubt on the proposition that disestablishment was thought to be associated with an essential individual right.

On this view, incorporation of the Establishment Clause would be categorical error. If the goal of incorporation is to ensure that the states do not infringe those individual liberties essential to ordered liberty, there must be an individual liberty

to be incorporated. If the Establishment Clause was meant to delineate who was authorized to establish religion (the states) rather than to proscribe establishments because establishment itself was inconsistent with individual liberty, there is no right to incorporate.

For these reasons, Justice Thomas has called for this Court to reconsider incorporation of the Establishment Clause. *Newdow*, 542 U.S. at 51 (Thomas, J., concurring). So far, this Court has not accepted that invitation. This case – asking the Court to evaluate the constitutionality of a passive display thought by some to convey a religious message – presents an opportunity to do so.

II. If the Establishment Clause Protects an Individual Right, this Court Should Clarify Exactly What that Right Is

But even if the Court is reluctant to revisit old doctrine, the question of incorporation underscores the need to delineate the contours of the incorporated right. The relationship between that purported right and displays such as the memorial at issue here has been difficult to define. That difficulty has left lower courts – and more importantly government decision-makers – with no real guidance as to what will and will not be allowed.

At least part of this definitional difficulty has been the struggle to reconcile the tension between restraining government endorsement of religious views and preventing endorsement of hostility toward those views. That tension has been exacerbated because this Court's decisions have

often insisted upon an ambitious view of disestablishment – one that seeks to ensure that even non-coercive and implicit endorsements of religion are avoided.

That ambition has made it difficult, if not impossible, to extend equal protection to dissenting believers and nonbelievers. It has made it hard to maintain governmental neutrality between religion and irreligion, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), and to ensure that no one feels like an "outsider," *County of Allegheny v. ACLU*, 492 U.S. 573, 625 (1989). This case presents an opportunity to clarify the treatment of passive displays by recognizing, in the absence of coercion, that states need not attempt to ensure perfect neutrality among differing religious and irreligious perspectives. Indeed, to do so is impossible.

The question is first addressed by asking if the Establishment Clause does protect an individual right, exactly what individual right is that? It might be a right to be free of something resembling a traditional establishment of religion, *i.e.*, a church which the government funded and controlled and in which government used its coercive power to encourage participation or to which it granted privileges. *See* Thomas J. Curry, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA, 37 (2001). Or it might protect the right to be free of legal coercion to participate or support religious activities without regard to whether such coercion is claimed to abridge religious free exercise. *See Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

But this Court has not so limited the incorporated right. It has not found the right to be violated only by established churches or government coercion. It has instead insisted upon a more robust and expansive mandate of neutrality and noninterference with respect to religion. That prohibition is not limited to coercive practices or to government expression that expressly endorses religion. *McCreary*, 545 U.S. at 883. A government action can be found to endorse religion even when it expressly disavows such endorsement. *Id.* at 870-71; *Stone v. Graham*, 449 U.S. 39, 41 (1980). The Establishment Clause injury can be both subjective and slight, consisting of exposure to a message that one does not wish to hear.

A. The Court uses multiple tests to determine whether the Establishment Clause has been violated

The doctrinal formulation by which these results have been reached has varied greatly. The Court sometimes applies the test announced in *Lemon*, requiring that a government action must: (1) "have a secular legislative purpose"; (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613 (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)). But it has also said that the *Lemon* criteria are "no more than helpful signposts," and do not represent a comprehensive test. *Hunt v. McNair*, 413 U.S. 734, 741 (1973). The Court has, at times, refused to apply *Lemon*, preferring instead to ask whether a

government action impermissibly "compelled" conformity with an "explicit religious exercise," *Lee*, 505 U.S. at 596, 598, whether it has impermissibly "endorse[d]" religion, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000), or whether the challenged religious practice or message was sufficiently grounded in historical practice. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

At other times, it has emphasized "endorsement," relying on Justice O'Connor's view that religious expression by the state is forbidden when its purpose or effect is to endorse religion or nonreligion, or one religion over another. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring). Endorsement, in this view, "sends a message to non-adherents that they are outsiders, not full members of the political community." *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Lynch*, 465 U.S. at 688). Government must not make a person's religious beliefs "relevant in any way to a person's standing in the political community" by conveying a message "that religion or a particular religious belief is favored or preferred." *Id.* at 593-94 (first quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring), then quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (emphasis removed)).

B. Courts, including this one, have applied Establishment Clause tests inconsistently

Circuits have split on whether to apply *Lemon* to cases involving passive displays of a religious message such as this one. *See* Petition for Writ of Certiorari at 22-23, *The American Legion v. American Humanist Association*, No. 17-1717 (June 25, 2018). Here, the Court of Appeals applied *Lemon* but "with due consideration given to the *Van Orden* factors." *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 205 (4th Cir. 2017). In applying *Lemon*, the Court of Appeals also emphasized the requirement that government not impermissibly endorse a religious view. *Id.* at 200.

This split is reflected in this Court's own decisions. In *McCreary*, this Court held that a municipal display of the Ten Commandments, even when accompanied by secular materials designed to emphasize their historic role in the development of law, was unconstitutional. 545 U.S. at 856-67. The Court applied the *Lemon* criteria and concluded that an observer would perceive a religious message and a dissenter would feel impermissibly excluded. *Id.* at 868-73.

But in *Van Orden*, decided the same day as *McCreary*, the Court came out the other way with respect to a different display of the Ten Commandments, this time a free-standing monument that had stood on the Texas Capitol grounds for over forty years. 545 U.S. at 681-82. In upholding the display, neither the plurality nor Justice Breyer, whose concurrence was decisive in upholding the display, found *Lemon* to be helpful. *Id.* at 686 ("[W]e think [*Lemon*] not useful in dealing

with the sort of passive monument that Texas has erected on its Capitol grounds."); *Id.* at 704 (Breyer, J., concurring) ("I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves.").

McCreary and *Van Orden* are not the only cases reaching different results in similar cases. For example, in *Lynch*, 465 U.S. 668, the Court upheld an annual Christmas display in the city's shopping district, consisting of a Santa Claus house, a Christmas tree, a banner reading "Season's Greetings," and a nativity crèche. But in *Allegheny*, 492 U.S. 573, the Court found that 1) the holiday display of a crèche was unconstitutional, while 2) that of a menorah was not. This has, understandably, led to frustration regarding the absence of clearer guidance.

Attempting to sum up the Court's cases, Justice Breyer has noted that the purpose of the Religion Clauses is to promote "the fullest possible scope of religious liberty and tolerance for all." *Van Orden*, 545 U.S. at 698 (Breyer J., concurring) (quoting *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963)). They must be interpreted to avoid "divisiveness" by maintaining "separation of church and state." *Id.* But too much separation, so as to "purge from the public sphere all that in any way partakes of the religious," is also impermissible because that, too, would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699. It must maintain this perfect equipoise not only among "sects," but

between "religion and nonreligion." *Id.* at 698. Justice Breyer could conceive of no test that might tell us whether government has strayed from the narrow path on which it must stay. *Id.* at 700.

C. The contradictory results demonstrate Establishment Clause jurisprudence's internal flaws

But the inconsistency may not be the result of a failure to achieve some desired degree of rigor applying Establishment Clause doctrine, but the sheer impossibility of doing so. The only thing consistent about the results in Establishment Clause cases is their inconsistency. This is less likely a sign that courts have not tried hard enough to apply these tests, and more likely a sign that the tests themselves are fundamentally flawed. That fundamental flaw is the tests' contradictory nature.

While the Court has, at times, framed disestablishment in terms of separation, it has also, as Justice Breyer has noted, recognized that too much separation can itself raise establishment concerns. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). If the government is to remain neutral between religion and irreligion, *Epperson*, 393 U.S. at 104, and if it must assure that no one – believer or nonbeliever – is made to feel like "an outsider," *Allegheny*, 492 U.S. at 625, then excluding religion – and only religion – from places where it might seem to belong is equally problematic.

This tension has been evident from the Court's earliest cases of the modern era of Establishment Clause jurisprudence. In *Everson*, for

example, the Court observed that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." 330 U.S. at 18. Nevertheless, after *Everson*, the avoidance of establishment has in fact acted to handicap religion in the public space. Justice Goldberg, concurring in *Schempp*, warned against this troubling development:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

374 U.S. at 306 (Goldberg, J., concurring).

More recently, Chief Justice Rehnquist suggested that the Establishment Clause jurisprudence is "Janus-like," looking both "toward the strong role played by religion and religious traditions throughout our Nation's history," and also "toward the principle that governmental intervention in religious matters can itself endanger religious freedom." *Van Orden*, 545 U.S. at 683.

The anti-religious reconciliation of this tension is exacerbated by the often ambitious nature of Establishment Clause jurisprudence. Prohibited endorsement can be very slight. *See Id.* at 694-95 (Thomas, J., concurring) ("[T]his Court's precedent permits even the slightest public recognition of religion to constitute establishment of religion."). It can be vague enough to encompass the views of just about everyone. *Engel v. Vitale*, 370 U.S. 421 (1962), and *Lee*, 505 U.S. 577 (1992), for example, involved brief nondenominational prayers, endorsing no theological belief other than the existence of a God who, perhaps, responds to intercessory prayer. Endorsement of a religious perspective need not involve any claim of exclusive truth or affirmation. It can even consist of a speech that expressly disavows endorsement, merely acknowledging religious sentiment or belief as a source of our democracy or as something which is or has been believed by some of us at some time. *See McCreary*, 545 U.S. at 870-71 (Foundations of American Law and Government exhibit included Ten Commandments along with other documents significant to historical foundation of American government). Prohibited endorsement can occur even when the burden is minimal or without any real assessment of the likelihood that it will have any real impact on religious choices.

In *Lee*, the Court found an Establishment Clause violation where students were exposed to a brief nonsectarian prayer at a graduation ceremony. 505 U.S. at 591. As Justice Thomas has observed, students were not "'coerced' to pray" but "[a]t most . . . are 'coerced' into possibly appearing to assent to the prayer." *Newdow*, 542 U.S. at 47 (Thomas, J.,

concurring). In *Santa Fe*, it was violated where citizens were exposed to student-initiated and student-led prayers at public high school football games. 530 U.S. at 316-17; *see also Wallace*, 472 U.S. at 40, 61 (finding that an Alabama law that "authorized a period of silence 'for meditation or voluntary prayer'" violated the First Amendment). The mere display of a religious symbol or message with corresponding secular symbols or messages can violate the Establishment Clause. *See McCreary*, 545 U.S. at 875-81.

The ambitious nature of our Establishment Clause jurisprudence requires the government to not simply avoid intolerance, but to adhere to an elaborate etiquette of sensitivity. A holiday crèche scene might be unconstitutional even if combined with a Chanukah menorah, but may be permissible if displayed in a way, such as alongside secular symbols, that convinces a majority of Justices (or the Justice or Justices casting the deciding votes) that no endorsement was intended or could be reasonably perceived. But as the Court has been sharply divided in all these cases, these perceptions are matters on which reasonable people may differ, making any predictions based on their guidance useless.

D. Current Establishment Clause jurisprudence causes the harms it should protect against

The problem with such an ambitious goal of non-endorsement is not so much that it is wrong, but that it is impossible to apply.

Government sends many messages – about history, science, and values, for example – that cannot help but impinge upon religious beliefs. The exclusion or restriction of religious perspectives or messages under circumstances in which some religious adherents believe them pertinent is the driving force behind cases involving holiday displays, public monuments, and voluntary prayer. Public spaces have always been places used to express community values. Plaques, public art, and memorials purport to express and reinforce those values. Public acknowledgment of major and widely-shared religious observations and of the perceived religious sources of law and human liberty (such as the Declaration of Independence's reliance on inalienable rights endowed by a Creator) is expected. To be effective such public displays ought to take place in a way that citizens will find meaningful.

If state-sponsored public acknowledgments of various aspects of a community's values and heritage must be secular, does the State risk crowding out religious values and heritage by its failure to acknowledge them? Being told that religious values and history cannot be celebrated the same way as secular values and history is rightly perceived as a message of disapproval and marginalization.

For example, current doctrine might forbid a display of the Ten Commandments or an acknowledgment of the religious beliefs of our nation's founders or citizens. It would not forbid a monument celebrating the work of Charles Darwin or the role of science and reason as a source of values. Does that not lead to a feeling of exclusion

and a perception of disapproval of some religious individuals? When the government celebrates a religious holiday with secular symbols, will its citizens perceive this as a commandeering of their heritage for other purposes? When it acknowledges our history but removes religious parts of it, what message does that send about what history is and is not important?

The problem is not solved by dismissing the feeling of religious citizens that they have been marginalized as an interpretive choice or something that must be tolerated because the Constitution "requires" it. To do so is to assume the conclusion. Nor does it help to say that a constitutionally-enforced public secularity is the price we pay for religious freedom – the common ground that must be accepted in order to avoid the war of "all against all." *See* Kathleen M. Sullivan, Comment, *Rainbow Republicanism*, 97 YALE L. J. 1713, 1717 (2003). That sense of injury experienced by religious persons when religion is purposely excluded is the very injury the Establishment Clause is supposed to prevent.

Under the working theory, no one should be made to feel like an outsider. *See Lynch*, 465 U.S. at 688 (O'Connor, J.,concurring); *see also McCreary*, 545 U.S. at 860 (quoting *Santa Fe*, 530 U.S. at 309-10); *Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). No one should have to sit quietly in the face of communications that breach this neutrality. *See, e.g.*, *Santa Fe*, 530 U.S. at 294, 317 (holding that a school policy authorizing student-led and student-

initiated prayers at high school football games was an unconstitutional endorsement of religion); *Lee*, 505 U.S. at 580, 599 (disallowing a public school system's provision of clergy-led, nonsectarian prayer at school graduation ceremonies); *Wallace*, 472 U.S. at 41-42, 61 (holding unconstitutional an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer).

But as a practical matter, those "no ones" include only people offended by religious sentiments. Under current doctrine, it is perfectly acceptable for government expression to make religious persons feel like outsiders or to make them sit quietly in the face of communications that strike at the heart of their beliefs. The notion that religion is private and should be dismissed to the "upstairs room" and kept "out of sight," is itself not religiously neutral. Dr. N. T. Wright, *Lecture at Jubilee Reflections at Westminster Abbey: God and Caesar, Then and Now*, available at http://ntwrightpage.com/2016/05/07/god-and-caesar-then-and-now/. To say that the government can establish all orthodoxies but religious ones is to relegate religion to second-class status. That is a result neither compelled nor condoned by the Constitution.

CONCLUSION

This case represents an opportunity for the Court to examine whether the Establishment Clause protects an individual right, and if it does, just what an individual right to disestablishment means in the context of a passive display claimed to endorse

religion or a particular religion. In particular, because it is impossible for the government to avoid at least acknowledging messages that some citizens will not sanction, any individual right against establishment applicable to the states should not set this as the constitutional bar. It should concern itself with the indicia of traditional establishments, coercive practices, and government actions that more significantly intrude on religious decision-making and the beliefs of religious and irreligious dissenters. This Court should reverse the decision of the Fourth Circuit below.

Respectfully submitted,

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